85-310

No.

Supreme Court, U.S.
AUG 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MONTGOMERY WARD & CO., INCORPORATED,

Petitioner,

v.

MARJORIE LOUISE DABNEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Without direct state precedent interpreting Section 535.3 of the Iowa Code allowing prejudgment interest, did the Court of Appeals properly permit prejudgment interest to be assessed against Montgomery Ward in a situation relating back to the original filing of the complaint in 1979 where the first trial, which resulted in a verdict for plaintiff, was reversed by the Court of Appeals because of errors by the trial court and where another verdict for plaintiff was entered after retrial?

2. If the Court of Appeals has properly construed Iowa Statutes to permit prejudgment interest to be assessed for the period of time, in this case over 20 months and approximately $475,000, during which the first case had been reversed and was awaiting retrial, does the Iowa Statute run afoul of the due process and equal protection clause of the Fourteenth Amendment to the extent that it unduly discriminates against appellants who seek review of a trial court decision, in good faith and do in fact obtain a reversal of that decision and mandatory retrial?

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IN THE

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No.

MONTGOMERY WARD & CO., INCORPORATED,

Petitioner,

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MARJORIE LOUISE DABNEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Montgomery Ward & Co., Incorporated respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 9, 1985.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix ("App."), *infra*, 1) is reported at 761 F.2d 494. The Opinion of the District Court (App.19) is not reported. The order of the Court of Appeals denying a rehearing and denying a rehearing en banc is reproduced *infra*, (App. 26).

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1985. A timely petition for rehearing and rehearing en banc was denied on July 1, 1985. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Iowa Code Section 535.3 reads as follows:

> "Interest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum applicable rate permitted by the provisions of section 535.2, which rate must be expressed in the judgment or decree. The interest shall accrue from the date of the commencement of the action."

Iowa Code Section 684A.1 states:

> "The supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the intermediate appellate court of another state, when requested by the certifying court, if there are involved in a proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the appellate courts of this state."

STATEMENT OF THE CASE

The previous decision in this matter in front of the Eighth Circuit in 1982 is reported at 692 F.2d 49. In that opinion the Court of Appeals reversed the verdict and judgment of the District Court for a variety of reasons and remanded this matter for a new trial. Review of the Court of Appeals decision was sought by respondent here, Marjorie Dabney, both in a Petition for Rehearing En Banc and in a Petition for Certiorari filed with this court on March 18, 1983. Those petitions were denied and some 20 months later the matter was retried and resulted in another verdict in favor of Marjorie Dabney. A review of the trial court decision was again sought by Montgomery Ward urging various grounds of error.

The only ground upon which review is sought in this Court is that part of the decision of the Court of Appeals interpreting Section 535.3 of the Iowa Code. The Court of Appeals held that section required the imposition of prejudgment interest from the date of the second judgment on February 9, 1984 back to the original date of the filing of the complaint in this action on October 12, 1979, including that portion of time during which the first judgment of the court had been reversed, plaintiff/respondent unsuccessfully sought review and the case was waiting for retrial. The Court of Appeals stated (App. 16-17) that the issue had not been clearly decided by the Iowa Supreme Court and the Court of Appeals would defer to the Decision of the District Court permitting prejudgment interest during this period of time. In doing so, the Court of Appeals treated the question of prejudgment interest as compensation. In reaching this decision, the Court of Appeals refused to certify the question to the Iowa Su-

preme Court as provided by Iowa law and as requested by the petitioner (App. 27). In so doing, the Court of Appeals: a) ignored Iowa precedent denying interest accrual on a vacated judgment during the period of time of the successful appeal and did not follow precedent within the Eighth Circuit or other circuits; and, b) has issued a decision which will have a chilling effect of discouraging appeals where there are obviously legitimate issues to be reviewed. The first appeal resulted in a reversal of the trial court in this case.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals departs from both the precedent of the Iowa Supreme Court and prior Eighth Circuit decisions. While the Court cites *Arnold v. Arnold*, 140 N.W.2d 874, 878 (1966) which allowed post-judgment interest to accrue from the original judgment date on a judgment which was increased on appeal, the Court ignored the decision of the Iowa Supreme Court in *Muchmore Equipment, Inc. v. Grover*, 334 N.W.2d 605, 610 (Ia. 1983). In *Muchmore* the Iowa Supreme Court, citing different portions of the *Arnold* decision than relied upon by the Court of Appeals, stated:

> "Generally, when a judgment is modified on appeal and the only action required in the trial court is compliance with the mandate of the Appellate Court the interest runs from the date of the original judgment; however, when a judgment is reversed the interest is not generally computed and accrued during pendency of the appeal."

While neither the *Arnold* case nor the *Muchmore* case involved prejudgment interest, the fact that the Court of Appeals treats prejudgment interest as ordinary compensation in the sense of giving the plaintiff the fair value of the amount found due from the time of filing of the complaint, which is the same principle upon which post-judgment interest is given, that is, making sure that the plaintiff has the fair value of the money found due at the time of judgment, the *Muchmore* case does support the position here that, during the period of time that the first appeal was pending and the matter awaiting retrial after a successful appeal by defendant, prejudgment interest, which in this case amounts to $475,620 for that period, should not be chargeable to Montgomery Ward.

Since there is no direct precedent in Iowa, because there has been no decision on the prejudgment interest issue as opposed to post-judgment interest, the Court of Appeals, if the issue was unclear, could have exercised the right given under Iowa statute to refer the case to the Iowa Supreme Court for verification. This was requested by Montgomery Ward but this request was denied. The refusal to do so on these facts raises serious constitutional and judicial administration issues.

The Eighth Circuit in *Hysell v. Iowa Public Service Company*, 559 F.2d 468 (1977) dealt with the question of how to compute post-judgment interest under Title 28 U.S.C. § 1961 which formerly provided:

> "interest shall be allowed on any money judgment in a civil case recovered in a District Court . . . Such interest shall be calculated from the date of the judgment at the rate allowed by state law."

The Court was dealing with a situation similar to the one here. In *Hysell* the first verdict had been successfully

challenged on appeal, the judgment vacated and matter remanded solely on the issue of damages and for the entry of a new judgment. The Court of Appeals found that it would be improper under principles of fairness and equity to allow the post judgment interest to run from the date of the original judgment and the Court stated that the interest should be computed from the date of the second judgment. In fact, the Court emphatically stated that "Interest does not accrue on a vacated judgment", *Ibid.*, at p. 476 relying on *Riha v. International Telephone & Telegraph Corp.*, 533 F.2d 1053 (8 Cir. 1976).

Likewise, other Courts of Appeal have come to the same conclusion. In *Reiss Steamship Company v. United States Steel Corporation*, 427 F.2d 1152, 1153-54 (6 Cir. 1970) the Court, dealing with prejudgment interest specifically, found that it would be inequitable to allow the prejudgment interest award for the period from the date of the filing of the Notice of Appeal until the date of the entry of judgment of reversal and for other periods of time during which there had been a successful review for defendant.

If the interpretation of the Court of Appeals, allowing prejudgment interest even for the period of time covered by a successful appeal resulting in a reversal, is allowed to stand, it would create serious questions as to the constitutionality of the Iowa statute allowing prejudgment interest. Certainly there is no problem where an appeal results in affirming the trial court's decision in relating the prejudgment interest back to the original filing of the complaint as contemplated by Iowa Section 535.3. But, if that section does cover the total period of time back to the original filing of the complaint, including the period of time involved in a successful review where the first verdict was reversed because of prejudicial errors or other

reasons, the decision would seriously impair the willingness of appellants in good faith to seek review. Whatever policy reasons may exist for placing the chance of an unsuccessful review on an appellant, certainly those policy reasons do not apply where the review is successful. If that were the case, appellants would not only be discouraged from seeking legitimate review but, in fact, would be penalized for being successful in doing so.

This issue is not unlike the question addressed in *Lindsey v. Normet*, 405 U.S. 56, 78-79 (1972), 92 S.Ct. 802, 876-87, wherein this Court allowed proper remedies by a state to discourage insubstantial appeals if the rules are reasonably tailored to achieve the ends and do not unfairly discriminate against persons taking appeals no matter how meritorious their case may be. This Court presently has before it awaiting review, *Aetna Life Insurance Company v. Margaret W. Lavoie, et al.*, on appeal from the Supreme Court of Alabama, No. 84-1601. That case involves the issue of the validity of a 10% penalty imposed by Alabama statute payable upon affirmance of a money judgment. The issue in that case is whether it is permissible to impose the 10% penalty without violating the rules set forth in *Lindsey* in a situation in which the review is sought in good faith and with legitimate issues, including those of first impression (as here).

The result in this case is even more far reaching for we are dealing, not just with a simple 10% penalty but, with prejudgment interest at the statutory rate in Iowa of 10% for a period of time totally outside the control of the appellant depending on how long it takes for the appellate process to proceed, and notwithstanding that the appeal is clearly in good faith because it results in a reversal and new trial being ordered. Whatever may be the rationale for permitting prejudgment interest, it surely

should not apply during any period of time of an appeal resulting in a success and in a retrial because of errors (or other reasons) made during the course of the first proceeding. There are certainly remedies and procedures available by which the state can control frivolous appeals. If the appeal is not successful, certainly the imposition of prejudgment interest is not an issue. However, where the appeal is successful, it is not only inequitable it is downright chilling to an orderly judicial review process to allow prejudgment interest to be imposed for that period of time caused by the need to seek a successful review of the first decision of the trial court.

CONCLUSION

For these reasons it is respectfully requested that a writ of certiorari should issue to review the Judgment and Opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
JUDGMENT

September Term, 1984

No. 84-1537SI

MARJORIE LOUISE DABNEY,

Appellee,

VS.

MONTGOMERY WARD & CO., INC.,

Appellant.

Appeal from the United States District Court
for the Southern District of Iowa

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the District Court is affirmed in accordance with the opinion of this Court.

May 9, 1985

Costs of briefs of appellee for recovery from appellant: $193.28

A true copy:

ATTEST: /s/ ROBERT D. ST. VRAIN
Clerk, U.S. Court of Appeals,
8th Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1537

MARJORIE LOUISE DABNEY,

Appellee,

v.

MONTGOMERY WARD & CO. INCORPORATED,

Appellant.

and

HONEYWELL, INC.

Appeal from the United States District Court
for the Southern District of Iowa

Submitted: October 11, 1984
Filed: May 9, 1985

Before ROSS and MCMILLIAN, Circuit Judges, and DEVITT*, Senior District Judge.

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* The Honorable Edward J. Devitt, United States Senior District Judge for the District of Minnesota, sitting by designation.

McMILLIAN, Circuit Judge.

Montgomery Ward & Co. appeals from a final judgment entered in the District Court[1] for the Southern District of Iowa upon a jury verdict awarding Marjorie Louise Dabney $2,000,000, which amount included prejudgment interest, for injuries sustained in a fire allegedly caused by a wall heater (furnace) manufactured by Montgomery Ward. For reversal Montgomery Ward argues that the district court erred in (1) denying its application for destructive testing of the louvers of the furnace, (2) denying the jury's request for a transcript of the testimony of an expert witness, (3) denying a request to amend an answer and an instruction on comparative fault, (4) denying its motion for new trial based on insufficient evidence as to proximate cause, (5) admitting into evidence cumulative photographic evidence of Dabney's injuries, (6) denying its request for remittitur, and (7) denying its motion for altered judgment based on a tolling of the interest during the pendency of Montgomery Ward's successful appeal on the first trial. For the reasons discussed below, we affirm the judgment of the district court.

On October 15, 1977, Dabney suffered serious burns in a fire which occurred in her apartment in Burlington, Iowa. She leased this apartment and the lessor bore the responsibility of cleaning and maintaining the apartment, including the furnace. At the time of the fire, Dabney was 51 years old and lived alone in the apartment. Dabney was employed as a waitress at a neighborhood tavern and normally worked 45-69 hours per week at the rate of $3.50 per hour.

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[1] The Honorable R.E. Longstaff, Magistrate, United States District Court for the Southern District of Iowa.

Dabney testified that on the evening of the fire she had fallen asleep on the sofa in the living room. The sofa was 10-15 feet from the furnace and was located on the north wall of the living room under a window covered by draperies. The draperies caught fire and fell from the rod onto Dabney and the back of the sofa. Dabney testified that she awoke but was unable to see because of the smoke. When she tried to get out of the front door of the apartment, she was unable to manipulate the door knob because of the burns on her hands and arms. She then went to the rear of the apartment and into a closet which had a common wall with the apartment on the other side of the building occupied by her mother. She knocked on the wall, moaned and collapsed in the closet. Dabney's mother was awakened by "a terrible noise" and heard her daughter on the other side of the wall. Firemen found Dabney severely burned and collapsed in the closet adjacent to the apartment bathroom.

As a result of the fire, Dabney sustained serious injuries, including second and third degree burns over 36% of her body. She was hospitalized at the University of Iowa Burn Treatment Center for treatment of these burns. Dabney underwent eleven surgical operations over a three-year period. As a result of her burns, Dabney could not shut her eyelids and her eyelids were sewn almost completely shut for two years. Dabney was required to wear elasticized "pressure garments" for three and one-half years in order to reduce the scarring from the burns. She also wore collars or braces, including a mouth brace, for two years in order to minimize contraction of her skin while it healed. Her skin will not regenerate, her sweat glands are permanently destroyed on the areas where she was burned, and she has permanently lost the use of her tear ducts. Because of the extensive

burns to the skin, she is unable to tolerate extremes of heat and cold. She also suffers from emotional depression as the result of the change in her physical appearance. Dabney testified that she frequently is afraid to go to sleep at night because of the fire. Dabney offered evidence of past and future medical expenses in the amount of $88,945. Her physician testified that Dabney is unemployable and suffers permanent disfigurement, scarring and pain.

On October 12, 1979, Dabney filed suit against Montgomery Ward and sought money damages for personal injuries she sustained as a result of the October 15, 1977, fire in her apartment. Dabney specifically alleged that the fire in her apartment was proximately caused by a defect in the design of a Montgomery Ward SBI9074 furnace. On September 23, 1981, the jury returned a verdict in favor of Dabney in the amount of $1,000,000. The judgment entered thereon was subsequently reversed and the case remanded for retrial by order of this court in *Dabney v. Montgomery Ward & Co.*, 692 F.2d 49 (8th Cir. 1982), *cert. denied*, 461 U.S. 957 (1983).[2] On retrial a verdict was rendered on February 9, 1984, for Dabney in the amount of $2,000,000; on the same date the district court entered judgment for that amount and awarded Dabney prejudgment interest from the date of the filing of the complaint on October 12, 1979, until the date of the second judgment. On February 21, 1984, the district

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[2] This court held that the district court abused its discretion in denying Montgomery Ward's request to amend its witness list by adding the name of a witness who was only discovered on the morning the trial was scheduled to commence and in refusing thereafter to grant Montgomery Ward a new trial. *Dabney v. Montgomery Ward & Co.*, 692 F.2d 49, 51-52 (8th Cir. 1982), *cert. denied*, 461 U.S. 957 (1983).

court denied Montgomery Ward's request for a new trial or an altered judgment. This appeal followed.

Dabney's theory of the cause of the fire is that the furnace was defective in design. Her experts stated that the natural gas flames from the main burners of the furnace were not confined inside the heat exchangers as required by the American Gas Association standards, but instead "licked out" beyond the base of the heat exchangers into the convective flow of room air through the furnace. All the combustion products and flames should be confined inside the heat exchangers and then discharged up the flue and out the chimney. During operation of the furnace, cooler room air was drawn into the bottom of the furnace, past the heat exchangers and then out the louvers. Dabney's experts testified that the flames "licked out" of the burner because the cross-section of the heat exchangers had not been properly designed and that this defect had existed at the time of manufacture. The experts testified that the furnace had ignited dust and lint which had accumulated inside the unit and the fire progressed outside the furnace with the natural convection of air through the louvers, down and directly onto combustibles in front and to the right of the furnace.

Montgomery Ward's experts testified that it was extremely unlikely that the fire started inside the furnace. The experts testified that no amount of lint or other debris could have accumulated inside the furnace sufficient to have possibly generated enough heat long enough to cause the fire, especially to have caused burning particles to fall 3-4 feet from the furnace (on the rug, curtains, sofa, or fur coat).

Destructive Testing of the Furnace

Montgomery Ward filed an application on October 11, 1983, for approval to perform destructive testing on certain parts of the furnace which had been involved in the fire. Montgomery Ward wanted to test portions of the louvers by exposing them to the kind of heat that would have been generated in a fire consistent with Dabney's theory of the cause of the fire. Dabney resisted this method of testing because the furnace (or at least that part of it which she considered essential to her case) would have been completely destroyed in the testing process. The district court denied Montgomery Ward's request to subject the louvers to this type of testing but did approve testing of three portions of the furnace's side wall assembly.

Montgomery Ward argues that the district court abused its discretion in denying its motion for destructive testing because the testing was essential to determine whether the discoloration of the paint on the louvers was caused by the fire or by other causes. Montgomery Ward argues that the district court's denial of the testing prevented it from obtaining evidence which would impeach Dabney's expert witnesses' credibility and discredit Dabney's theory of the cause of the fire. Montgomery Ward further argues that its interest in the destructive testing of the louvers greatly outweighed Dabney's interest in not performing the testing because photographs could have and did preserve evidence of the actual appearance of the louvers and Dabney had ample witnesses to testify as to what the photographs represented.

Dabney argues that the district court properly denied Montgomery Ward's request for destructive testing because the application was untimely and was deficient on

its face. Dabney argues that Montgomery Ward did not request an order for destructive testing until October 1983, four years after the fire and two years after the first trial of the case. Further, Dabney argues that Montgomery Ward's application was deficient because it failed to specify the time, place and manner of the testing, the size of samples to be taken from the furnace, or to indicate clearly that the results would be relevant and material to the issues in this case. Finally, Dabney argues that Montgomery Ward was not prejudiced because it had an opportunity prior to the first trial to photograph, inspect and test the furnace and, in compliance with the district court's order, was able to conduct destructive testing on portions of the furnace prior to the second trial.

Fed. R. Civ. P. 34 provides that "any party may serve on any other party a request . . . to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served." In general, parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action. Fed. R. Civ. P. 26(a)(1). "[A] district court has very wide discretion in handling discovery and will generally not be reversed unless 'in the totality of the circumstances the district court's rulings are a gross abuse of discretion resulting in fundamental unfairness.' " *Phil Crowley Steel Corp. v. Macomber, Inc.*, 601 F.2d 342, 344 (8th Cir. 1979) (citations omitted); *see O'Neal v. Riceland Foods*, 684 F.2d 577, 581 (8th Cir. 1982). Orders by a district court denying or limiting discovery, therefore, will not be reversed unless there has been a clear abuse of discretion. *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 898 (8th Cir. 1978).

We hold that the district court did not abuse its discretion in denying Montgomery Ward's request for destructive testing of the furnace. Although Montgomery Ward vigorously asserts that the district court's denial of its request for discovery prevented it from securing critical evidence, we note that Montgomery Ward did not request this evidence prior to the first trial and did not request the evidence until four years after the accident occurred. We further observe that the district court did permit limited destructive testing of other portions of the furnace and that Montgomery Ward did not indicate to the district court at the special hearing in November 1983 that the limited testing approved by the district court would prevent it from securing the necessary evidence for its defense. On the contrary, Montgomery Ward's response to the earlier decision could be viewed as acquiescence.[3] Further, Montgomery Ward's expert who conducted the destructive testing as permitted by the district court testified concerning his conclusions about the louvered section even though he did not specifically test that area of the furnace.

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[3] At page 22 of the transcript of the November 8, 1983, hearing, the district court said:

> I am very disturbed about your request to remove the louvers from sections A and B. Insofar as that is your request in the evidence or the record before me now, I am going to deny that application.
>
> I am less disturbed about your proposal to remove two-by-two sections from areas C, D and E. If that removal would be helpful to you, I will go ahead and allow that removal so long as it, of course, is in an area that doesn't reflect any burn pattern.
>
> . . . .
>
> MR. LIEBBE: Fine.

Jury's Request for Transcript of Expert Witness

Montgomery Ward argues that the district court abused its discretion in denying the jury's request for a transcript of the testimony of Carroll Stone Kirkpatrick. Kirkpatrick was Montgomery Ward's major expert witness and was asked on cross-examination whether he agreed that the removal of the enamel coating on the inside of the louvers was the result of a fire inside the furnace. Montgomery Ward argues that Dabney's counsel twice during the trial misstated Kirkpatrick's testimony concerning the cause of the damage on the inside of the upper louvers. The first misstatement allegedly occurred while counsel was questioning another defense expert witness; counsel allegedly stated that Kirkpatrick had agreed with Dabney's theory of the cause of the fire. Montgomery Ward further argues that during closing argument Dabney's counsel argued that Kirkpatrick had stated that the enamel coating was removed from the louvers because of a fire which began within the furnace. Montgomery Ward asserts that because of these two misstatements and the importance of Kirkpatrick's testimony to the defense, the district court should have granted the jury's request for the transcript of Kirkpatrick's testimony.

"We note that the trial judge has traditionally been accorded broad discretion in the conduct of his trial and that an appellate court will not retroactively substitute its discretion for that of the trial judge unless there has been a showing of abuse." *Dobson v. Bacon Transport*, 607 F.2d 805, 807 (8th Cir. 1979) (citations omitted). The district court in denying the jury's request for the transcript stated that the Kirkpatrick testimony took approximately three hours, was highly technical, was the testimony of only one of five expert witnesses testifying with reference to liability in the case, could pose substantial prob-

lems in accurate rereading by the court reporter because of its technical nature, was presented to the jury just the day before the jury began its deliberation, and would have unduly emphasized the testimony of one of the five technical and expert witnesses. The district court also instructed the jury that "[s]tatements and arguments of counsel are not evidence in the case." We hold that the district court did not abuse its discretion in denying the jury's request for the transcript.

Denial of an Instruction on Comparative Fault

Montgomery Ward argues that the district court erred in denying its motion to amend its answer to add the affirmative defense of comparative fault. Further, Montgomery Ward argues that the district court erred in refusing to give an instruction on comparative fault because Iowa courts, if presented with the issue, would have held that comparative fault was applicable to strict liability cases. Lastly, Montgomery Ward argues that it presented evidence that Dabney was contributorily negligent in failing to notify the landlord that the furnace had not been cleaned in the two years before the fire.

"In the absence of controlling state law, 'it is the duty of a federal court to apply the rule it believes the state supreme court would follow.' " *Sperry Corp. v. City of Minneapolis*, 680 F.2d 1234, 1238 (8th Cir. 1982) (citations omitted). Further, we are guided by the principle that the interpretation of state law by a district judge sitting in that forum is entitled to substantial deference unless it is "fundamentally deficient in analysis or otherwise lacking in reasoned authority." *Kansas City Power & Light v. Burlington Northern R.R.*, 707 F.2d 1002, 1003 (8th Cir. 1983) (citations omitted).

The district court held that Montgomery Ward was neither legally nor factually entitled to the requested amendment and jury instruction concerning comparative fault. The district court considered the case of *Goetzman v. Wichern*, 327 N.W.2d 742 (1982), wherein the Iowa Supreme Court held that the doctrine of comparative negligence was available in all cases in which contributory negligence had previously been a complete defense. Because the defense of contributory negligence had not been available in actions based on strict liability, *Franken v. City of Sioux Center*, 272 N.W.2d 422, 425 (Iowa 1978); *Hawkeye Security Insurance Co. v. Ford Motor Co.*, 199 N.W.2d 373, 380-81 (Iowa 1972), the district court held that the defense of contributory negligence was not available to Montgomery Ward in this strict liability case.

We have carefully reviewed applicable Iowa law and do not find the district court's interpretation of this law deficient in analysis or otherwise lacking in reasoned authority. We therefore hold that the district court did not err in denying Montgomery Ward's request for an amendment and a jury instruction on comparative fault.

Sufficiency of the Evidence

Montgomery Ward argues that the district court erred in denying its motion for a new trial because Dabney failed to present sufficient evidence of the specific proximate cause of the fire as required by Iowa law. *Northwestern National Insurance Co. v. Raid Quarries Corp.*, 249 N.W.2d 640, 645 (Iowa 1977). Montgomery Ward argues that Dabney's theory of the fire (lint and debris inside the furnace caught fire and spread into the apartment because of the defective design) is based on speculation because Montgomery Ward's expert testified that it

was impossible for there to be enough lint in the furnace to cause such a fire. Montgomery Ward argues therefore that the great weight of the evidence was contrary to Dabney's theory and thus the district court erred in denying its motion for a new trial.

The applicable standard of review is quite limited. "A motion for a new trial on the ground that the verdict is against the weight of the evidence is committed to the sound discretion of the trial court and its decision will be reversed only upon a clear showing of abuse." *Rey v. City of Fredericktown*, 729 F.2d 1171, 1174 (8th Cir. 1984). *See Burnett v. Lloyds of London*, 710 F.2d 488, 489-90 (8th Cir. 1983). "Ordinarily no error can be predicated upon the denial of such a motion for a new trial." *Bond v. IMFS, Inc.*, 727 F.2d 770, 771 (8th Cir. 1984). Montgomery Ward has failed to demonstrate any abuse of discretion by the district court in denying its motion for a new trial.

Photographs of Dabney's Injuries

Montgomery Ward argues that the district court erred in admitting photographs depicting the nature and extent of burns to Dabney's body. Montgomery Ward argues that the photographs were duplicative and cumulative and should have been excluded under Fed. R. Evid. 403 because their probative value was slight and was outweighed by the graphic nature of the photographs and the tendency of the photographs to incite and arouse the passions of the jurors. Montgomery Ward asserts that these photographs may have contributed to the size of the jury verdict which Montgomery Ward characterizes as excessive. Dabney was permitted to offer eleven photographs; a twelfth photograph was excluded as being duplicative.

Dabney argues that the photographs show the extent and nature of the injuries and also reflect the treatment and healing process.

The admission of photographs is a matter within the sound discretion of the district court. *Hale v. Firestone Tire & Rubber Co.*, No. 83-2406, 83-2407, slip op. at 16 (8th Cir. Mar. 13, 1985); *Roberts v. Hollocher*, 664 F.2d 200, 204 (8th Cir. 1981). The test to be applied is whether the prejudicial effect outweighs the probative value of the evidence. *Hale v. Firestone Tire & Rubber Co.*, slip op. at 16-17; *Giblin v. United States*, 523 F.2d 42, 44 (8th Cir. 1975), *cert. denied*, 424 U.S. 971 (1976). We hold that the district court did not abuse its discretion in admitting the photographs. The nature and extent of Dabney's physical injuries was an issue in this case.

Denial of Remittitur

Montgomery Ward argues that the district court erred in denying its motion for a new trial or, in the alternative, for remittitur of damages. Montgomery Ward argues that the verdict rendered by the jury was excessive and the product of passion and prejudice engendered in part by the admission of inflammatory photographs. Montgomery Ward also argues that the damage award was disproportionate to the actual injuries because Dabney presented evidence of medical expenses totalling approximately $62,000 and vague and insubstantial evidence of past earnings, which was inadequate as a basis of an award for loss of earnings or earning capacity. Montgomery Ward argues that $1,938,174.83 is an excessive amount to be awarded for pain and suffering, although Montgomery Ward acknowledges that Dabney experienced substantial pain, suffering and disability as a result of the fire.

Dabney argues that the award of $2,000,000 is not excessive because of the nature and extent of the injuries suffered. Dabney argues that she introduced the following evidence of damages: $61,825 for medical expenses incurred to the time of the trial, $27,120 for prescription drugs in the past and in the future, and $166,250 in lost wages. Further, Dabney argues that she has been permanently damaged and disfigured: 36% of her total body received second and third degree burns (on the face, chest, neck, back, arms and hands); her lower body is badly scarred because this area was used as donor sites of skin grafts; her lungs are damaged; her tear ducts and sweat glands are destroyed; her eyes still do not fully close; and she suffers severe emotional problems and difficulty in facing the public.

> "[E]xcessiveness of a verdict is . . . a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards; . . . we shall . . . consider review . . . not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is a 'plain injustice' or a 'monstrous' or 'shocking' result."

Vanskike v. Union Pacific R.R., 725 F.2d 1146, 1149-50 (8th Cir. 1984), *citing Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-48 (8th Cir.), *cert. denied*, 368 U.S. 929 (1961). An appellate court should be extremely hesitant to overturn a verdict which includes damages for pain and suffering. *Vanskike v. Union Pacific Railroad Co.*, 725 F.2d at 1150.

This court notes that the verdict for Dabney on retrial was approximately twice the verdict in the first trial. However, "we must expect substantial disparities among juries as to what constitutes adequate compensation for

certain types of pain and suffering." *Id.* We conclude under the facts presented at the second trial that the verdict was not so excessive that the district court can be said to have abused its discretion in denying the request for remittitur or a new trial.

Prejudgment Interest

Montgomery Ward argues that the district court erred in denying its motion for an altered judgment. Montgomery Ward sought a ruling tolling the accrual of interest from the entry of the first judgment (September 23, 1981) to the entry of the second judgment (February 9, 1984). The judgment entered by the district court awarded Dabney "interest at the rate of 10% from the date of the filing of the complaint, October 12, 1979, until the entry of the second judgment, February 9, 1984; and with interest from February 9, 1984 at the rate of 9.87% until paid." Montgomery Ward argues that this award of prejudgment interest during the pendency of the appeal violates Iowa Code § 535 (1983) and the Iowa Supreme Court's holding in *Muchmore Equipment, Inc. v. Grover,* 334 N.W.2d 605, 610 (1983).

Dabney agrees that Iowa law controls this question but argues that § 535.3 (emphasis added) specifically states "[t]he interest *shall* accrue from the date of the commencement of the action." Dabney further argues that *Muchmore Equipment, Inc. v. Grover,* cited by Montgomery Ward, does not stand for the proposition that interest does not accrue on the second judgment entered in a cause during the pendency of appellate review of the first judgment.

As we have previously indicated, "[w]e are guided by the principle that the interpretation of state law by a dis-

trict judge sitting in that forum is entitled to substantial deference, in the absence of controlling state precedent." *Nelson by Wharton v. Missouri Division of Family Services*, 706 F.2d 276, 278 (8th Cir. 1983), *citing Renfroe v. Eli Lilly & Co.*, 686 F.2d 642, 648 (8th Cir. 1982). The district court held that the Iowa Supreme Court had not addressed the specific question raised by this case, that is, whether entry of a second judgment for plaintiff after the first judgment was reversed on appeal entitles plaintiff to interest on the second judgment from the commencement of the action. The district court further observed that the debates surrounding the enactment of § 535 were not published in conjunction with the amendment and consequently the court must attempt to determine legislative intent. The district court held that it was reasonable to assume that the Iowa legislature intended to encourage settlements, fully compensate an injured party if the injured party recovered a judgment, and adopt the view that interest was to be viewed as compensation, which view has been adopted in other jurisdictions. *See, e.g., Carlton v. H.C. Price Co.*, 640 F.2d 573, 576 (5th Cir. 1981) (Texas). The district court found support for its position in the decision of the Iowa Supreme Court in *Arnold v. Arnold*, 140 N.W.2d 874, 878 (1966), which allowed interest to accrue from the original judgment date on a judgment which was increased on appeal. After a careful review of Iowa law on this issue, we conclude that the district court's analysis is not fundamentally deficient or otherwise lacking in reasoned analysis and uphold the district court's award of prejudgment interest from the date Dabney filed her complaint, including the time period from the entry of the first judgment to the entry of the second judgment.

Accordingly, we affirm the judgment of the district court.

A true copy:

ATTEST: /s/ ROBERT D. ST. VRAIN
Clerk, U.S. Court of Appeals,
8th Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

Civil No. 79-141-D-2

MARJORIE LOUISE DABNEY,

Plaintiff,

vs.

MONTGOMERY WARD & CO., INC.,

Defendant.

ORDER

This matter is now before the Court upon defendant's motion filed February 21, 1984 seeking a new trial or altered judgment. A resistance thereto was filed by plaintiff February 29, 1984. The defendant's motion seeks relief on several grounds.

DIVISION I—DESTRUCTIVE TESTING

The Court allowed defendant's expert to perform destructive testing on the wall heater involved in this litigation. In response to defendant's pretrial application, the Court allowed several sections to be removed from the wall heater. However, the Court did not allow sections to be removed from the louvered portion of the heater. Such a removal would have substantially altered a critical portion of the wall heater and placed plaintiff in an unfair position upon retrial of this case.

Defendant's expert who conducted the destructive testing testified at trial concerning his conclusions. The

testimony included conclusions about the louvered section even though he did not specifically test that area of the heater. His conclusions based on the testing were adequately supported from the samples he did take from the heater. Neither the plaintiff nor the defendant attempted to question the validity of those conclusions on the grounds that samples were not taken from the louvers themselves. The test data secured from the samples actually taken clearly supported the expert's conclusions and opinions; and this Court can perceive absolutely no prejudice to defendant's case by its Order limiting the destructive testing to areas other than the louvered portion of the heater.

Division II—Photographic Evidence

Throughout the trial, defendant continually objected to the introduction of photographs depicting plaintiff's injuries claiming said photographs were cumulative. The Court did sustain this objection with regard to one photograph. However, the Court, after carefully reviewing this series of photographs depicting plaintiff's injuries, concludes that the various photographs either depicted different portions of plaintiff's injuries during the same time period or depicted those injuries over an extended period of time. The photographs received in evidence were relevant and were not cumulative.

Division III—Testimony Of C. S. Kirkpatrick

During its deliberations, the jury requested this Court to provide it with a transcript of Mr. Kirkpatrick's testimony. The Court denied that request. Mr. Kirkpatrick had testified on the day before the jury commenced its deliberations. To provide the jury with a transcript of this testimony or to have the court reporter read this testimony back in its entirety would have unduly emphasized

this testimony. For the reasons stated in the record at the time it denied the request, the Court finds that its denial of this jury request was proper.

Division IV—Comparative Fault

Although the Iowa Supreme Court has adopted the doctrine of comparative negligence in negligence actions, it has not adopted that doctrine in connection with lawsuits based on the doctrine of strict liability in tort. The Court hereby reaffirms its ruling made prior to trial providing that, absent evidence demonstrating assumption of the risk, the comparative fault doctrine has no applicability in Iowa in a case based on strict liability in tort.

Furthermore, even if the doctrine had been applied in this case, the question of comparative fault would have focused on plaintiff's failure to clean the inside portions of the wall heater. There would have been little, if any, evidence in the record to support the submission of comparative fault in the context of this lawsuit.

With regard to defendant's contention that plaintiff caused the fire involved herein through careless smoking, this issue was presented to the jury as a proximate cause issue and the defendant was allowed to present all of its evidence in support thereof.

Division V—Insufficient Evidence

The testimony of Dr. Hall and Dr. Johnson provided support for plaintiff's theory as to how the wall heater involved herein proximately caused the fire resulting in plaintiff's injuries. The theory supported by this testimony was consistent with the physical evidence which was presented concerning the origin of the fire. A jury issue was clearly generated by the plaintiff as to the cause of the fire.

The statement contained in paragraph 16 of defendant's motion is a complete misstatement of the record. Gerry Ballard did not testify as suggested by defendant in that paragraph.

Division VI—Remittitur

The damages awarded in the second trial were not excessive in light of the pain and suffering endured by plaintiff in connection with the injuries she received as a result of this incident. This Court is unable to state that the verdict in the amount of $2 million was not within the framework of the evidence. It was a permissible verdict based upon the evidence of plaintiff's damages and cannot be labeled as being a result of the jury's passion and prejudice or the assessment of punitive damages. Clearly, the major portion of the award resulted from plaintiff's pain, suffering, and disfigurement. The Court finds that the damage evidence supports such an award.

Division VII—Interest

As the result of an amendment to Iowa Code section 535.3 which was enacted by the Iowa Legislature in 1980 and became effective on all judgments entered after January 1, 1981, a party may have interest accrue on a judgment from the date the action was commenced. The present case is before this Court on the basis of diversity jurisdiction, and thus the question of interest becomes one of prejudgment interest since federal law governs the interest on a judgment entered. *The Weitz Co. v. Mo-Kan Carpet, Inc.*, No. 83-1113, 83-1157 slip op. at 6-9 (8th Cir. Dec. 29, 1983).

The question presented by defendant's post-trial motion is whether prejudgment interest should accrue from the

commencement of this action since the Eighth Circuit reversed the first judgment entered in this case and granted the defendant a second trial. The second trial also resulted in a verdict for the plaintiff.

The most recent case discussing section 535.3 is *Muchmore Equipment, Inc. v. Grover*, 334 N.W.2d 605 (Iowa 1983). In that case, the court stated that:

> The assessment of interest on judgments may be affected by an appeal. When a money judgment in a law action is reduced in part on appeal, the judgment creditor is entitled to interest at the statutory rate for judgments. *Poulsen v. Russell*, 300 N.W.2d 289, 297-98 (Iowa 1981); *see* Annot., 4 A.L.R.3d 1223 (1968). Similarly, we held in *Arnold v. Arnold*, 258 Iowa 850, 857, 140 N.W.2d 874, 878 (1966), that in a divorce action if the judgment creditor appeals, and the appeal results in an affirmance with increased periodic alimony, interest on any amount overdue because of the increase or for another reason is not suspended and is allowed from the original date of judgment. This relating-back is also obtained in other civil suits where a money judgment is affirmed and increased. *Hetherington Letter Co. v. O. F. Paulson Construction Co.*, 192 N.W.2d 808 (Iowa 1971). In *Arnold* we further held that when additional specific relief is allowed on appeal, it draws interest from the date of procedendo; however, relief that requires further determination by the district court draws interest from the date of that court's supplemental decree. *Arnold*, 258 Iowa at 858-59, 140 N.W.2d at 879. We noted in *Arnold* that "the matter of suspension of interest pending appeal is governed by the nature of the case and results obtained." 258 Iowa at 857, 140 N.W.2d at 878; *see* 47 C.J.S. *Interest and Usury* § 66 (1982). Generally, when a judgment is modified on appeal and the only action required in the trial court is compliance with the mandate of the appellate court, the interest runs from the date of the original judgment; however, when a judgment is

> reversed the interest is not generally computed and accrued during pendency of the appeal. 47 C.J.S. *Interest and Usury* § 68.

Id. at 610. The Court is unaware of any case of the Iowa Supreme Court which addresses the interest question generated by entry of a second judgment for plaintiff after the first judgment was reversed on appeal.

Neither the debates surrounding the enactment of this amendment nor the legislators' intentions were published in conjunction with this amendment; consequently, the Court must speculate at the intent of the legislators. A logical interpretation of the legislature's action in enacting this amendment is that the legislature adopted the view that interest was to be viewed as compensation. This view has been adopted in other jurisdictions. *See Carlton v. H. C. Price Co.*, 640 F.2d 573, 576 (5th Cir. 1981); *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571, 575 (1973); *Lightcap v. Mobil Oil Corp.*, 221 Kan. 448, 562 P.2d 1, 14 (1977); *Nelson v. Travelers Insurance Co.*, 306 N.W.2d 71, 76-77 (Wis. 1981); *Schaefer & Associates, P. A. v. Schirmer*, 3 Kan. App. 2d 114, 590 P.2d 1087, 1092 (1979); *Benke v. Mukwonago-Vernon Mutual Insurance Co.*, 329 N.W.2d 243, 249 (Wis. App. 1982). This "time value" theory has been described in this manner:

> The purpose of prejudgment interest recognizes that the injured party was injured at the moment the cause of action accrued, and that the injured party is entitled to be made whole as of that moment. Thus, the purpose of prejudgment interest is to put a plaintiff in a position he would have been in had he had a trial and recovered his judgment immediately after his injury.

Carlton v. H. C. Price Co., 640 F.2d at 576.[1]

The Iowa Supreme Court's ruling in *Arnold* which was discussed in *Muchmore* appears to adopt this concept.

It is reasonable to assume that the Iowa Legislature amended section 535.3 to include the accrual of interest from the date the action is commenced because they wanted to induce settlements and fully compensate an injured party if the injured party recovered a judgment. The decision of the Iowa Supreme Court in *Arnold* wherein the increased judgment on appeal was allowed to draw interest from the original judgment date indicates that the Iowa Court would interpret 535.3 as embodying the "time value" theory to the extent that the plaintiff should be placed in the position he would have been in had the judgment been entered the date he filed the lawsuit.

The judgment entered by the Clerk February 9, 1984 correctly reflects the interest plaintiff is entitled to recover.

IT IS THEREFORE ORDERED that defendant's motion for a new trial or altered judgment be and is hereby denied.

Dated this 22nd day of March, 1984.

/s/ R. E. Longstaff
U. S. Magistrate

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[1] Other jurisdictions have ruled that when their interest statutes state that interest accrues on *all* judgments, the judgment debtor, in order to halt the accrual of interest during an appeal, must either deposit the amount of the judgment with the court or tender the amount of the judgment. *Henley v. Mabrey*, 125 Ga. App. 293, 187 S.E.2d 309, 310 (1972); *Schaefer & Associates, P.A. v. Schirmer*, 3 Kan. App. 2d 114, 590 P.2d 1087, 1092 (1979); *Phillips v. Mills*, 14 Md. App. 272, 286 A.2d 798, 801 (1972).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 84-1537-SI.

MARJORIE LOUISE DABNEY,

Appellee,

vs.

MONTGOMERY WARD & CO., INCORPORATED,

Appellant.

Appeal from the United States District Court
for the Southern District of Iowa

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

July 1, 1985

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 84-1537-SI.

MARJORIE LOUISE DABNEY,

Appellee,

vs.

MONTGOMERY WARD & CO., INCORPORATED,

Appellant.

Appeal from the United States District Court
for the Southern District of Iowa

Appellee's motion to certify a question to the Iowa Supreme Court has been considered by the Court and is denied.

July 1, 1985